STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MILTON WAYNE PERRY,

Defendant-Appellant.

UNPUBLISHED
November 25, 2003

No. 240626
Washtenaw Circuit Court
LC No. 01-000350-FC

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, malicious destruction of property under $200, MCL 750.377a(c)(1), aggravated assault, 750.81a, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to concurrent prison terms of twenty-three months to four years for the felonious assault conviction, sixty-five months to ten years for the assault with intent to do great bodily harm conviction, and fifty days each for the malicious destruction of property and aggravated assault convictions. He appeals as of right. We affirm.

I

On appeal, defendant first argues that the evidence was insufficient to support his felonious assault conviction, which was related to his conduct in a store parking lot.[1] When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citations omitted). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable

[1] The felonious assault charge was given as a lesser included offense to the crime of kidnapping for which defendant was principally charged.

apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Shoes and boots may be considered as dangerous weapons for purposes of felonious assault. *People v Hale*, 96 Mich App 343, 345; 292 NW2d 204 (1980), vac on other grounds 409 Mich 937 (1980); *People v Buford*, 69 Mich App 27, 31; 244 NW2d 351 (1976). Whether an object was used as a dangerous weapon is a question for the trier of fact. *Id.* at 31-32.

Defendant argues that the evidence was insufficient to establish that the assault occurred with a dangerous weapon. He claims that there was no testimony to support that he was wearing any footwear at the time of the charged assault, much less dangerous footwear. This argument fails. The victim testified that defendant was wearing either shoes or boots in his shop and, when he kicked her, it was hard and painful. Between the time of the assault in the Meijer parking lot, where the victim testified defendant kicked her, and the time defendant repeatedly kicked her in his shop, he was out of the victim's sight only long enough to put some towels in another room. Viewing the evidence and inferences in a light most favorable to the prosecution, a rational trier of fact could have found that defendant was wearing shoes or boots, which were hard, at the time he kicked the victim in the Meijer parking lot. The properly instructed jury could and did conclude that defendant's footwear was a dangerous weapon when used to kick the victim. *Buford*, *supra.*

II

Defendant argues that resentencing is required because the trial court improperly overruled his objections to the scoring of five different offense variables, which were scored the same for both the felonious assault and assault with intent to commit great bodily harm convictions. These issues are preserved because they were raised before the trial court at sentencing. MCL 769.34(10).

> A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. "Scoring decisions for which there is any evidence in support will be upheld." [*People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted).]

In general, we will not reverse a trial court's decision if it reaches the correct result albeit for a different or incorrect reason. *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991).

Defendant objected to the scoring of offense variable (OV) 1, MCL 777.31, at ten points for his conviction of assault with intent to do great bodily harm. Regardless of the reason articulated by the trial court when scoring ten points for OV 1, we find that the evidence adequately supported the scoring decision. MCL 777.31(1)(c) provides that ten points may be scored where the "victim was touched by any . . . type of weapon" other than a firearm, knife, or cutting or stabbing weapon. In *People v Lange*, 251 Mich App 247, 254-257; 650 NW2d 691 (2002), this Court determined that the phrase "any other type of weapon" as used in MCL 777.31(1)(c) embodies judicial definitions of dangerous weapons. *Id.* at 256-257. An automobile may be a dangerous weapon if used in the furtherance of accomplishing an assault and if capable of inflicting serious injury. *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984). In *Lange*, *supra* at 257, this Court also noted that the common dictionary definition of "weapon" includes "any instrument or device used for attack or defense in a fight or in

combat" or "anything used against an opponent, adversary or victim." OV 1 was properly scored at ten points under both judicial and dictionary definitions because defendant used his automobile as a weapon when committing the assault with intent to do great bodily harm less than murder.

Defendant also challenges the scoring of ten points for OV 4, MCL 777.34. Ten points may be scored under MCL 777.34(1)(a) if the victim suffers serious psychological injury requiring professional treatment. MCL 777.34(2) instructs that the factor is appropriately scored if the injury *may* require treatment, and it specifically indicates that the fact that treatment has not been sought is not conclusive. In this case, the victim testified at trial that she talked to her pastor and representatives of Safe House about the incident. She later informed the author of the presentence report that she lives "each and every day in fear" of defendant, that the offense has impacted her both physically and mentally, and that she has a "fear that never leaves." At sentencing, the victim stated that she still lived "with fear," that she relied on Safe House to help her "get through," and that Safe House was always there to take her calls. This evidence supports the trial court's scoring decision of ten points for OV 4. *Hornsby*, *supra.*

Defendant next argues that the trial court improperly scored fifty points for OV 7, MCL 777.37. We disagree. Fifty points may be scored where there is aggravated physical abuse, which includes a situation where the victim was treated with terrorism, sadism, torture, or excessive brutality. "Terrorism" is defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a); *Hornsby, supra.* Several facts support the trial court's scoring decision, including defendant's actions of repeatedly threatening to kill the victim's friend, threatening the victim with death, calling the victim names, yanking hair out of her head by the root, punching her in the kidneys causing her to urinate on herself, and chasing her down the street with an automobile after she escaped from his shop. Defendant deliberately engaged in "conduct designed to substantially increase the fear and anxiety" the victim suffered during the offenses, and he used excessive brutality in the attacks. Consequently, there was no error in the court's scoring decision. *Id.*

Defendant additionally challenges the scoring of OV 8, MCL 777.38(1)(a), which provides that fifteen points shall be scored if the "victim was asported to another place of greater danger or to a situation of greater danger." The series of events on February 20, 2001, began in a public parking lot. After defendant ended his assault in the parking lot, he escorted the victim by the hair to Korotney's automobile and had Korotney drive them back to his shop. The victim's asportation from a public parking lot to a private shop supports the court's scoring decision. The victim was moved to a place of greater danger where a more forceful assault occurred, and the later crimes arguably could not have occurred as they did without the victim being moved to defendant's shop. See *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003).

Finally, defendant challenges the scoring of OV 13, MCL 777.43(1)(c), which provides for a score of ten points where the "offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property." MCL 777.43(2)(a) specifically provides that "*all crimes* within a 5-year period, *including the sentencing offense*, shall be counted *regardless of whether the offense resulted in a conviction.*" (Emphasis added.) Defendant acknowledges that he had a pending felony charge for malicious destruction of property (MDOP) arising from another incident (Defendant's brief, p 26). In addition, defendant was being sentenced for two felony offenses. Thus, there were three felony crimes within a five-

year period.[2] Although defendant's felony MDOP charge had not yet resulted in a conviction, it was properly considered based on the plain language of the statute. Further, we note that, even if OV 13 was improperly scored, the sentencing guidelines range would not have changed. Defendant's total offense variable score was 117 points. If ten points was subtracted from that score, the total offense variable score would still exceed seventy-five points, the amount necessary to place defendant at the highest offense variable level for both of his felony convictions. MCL 777.65; MCL 777.67.

III

Defendant further argues that the trial court abused its discretion when it departed from the sentencing guidelines recommended minimum sentence range for assault with intent to do great bodily harm. MCL 769.34(3) provides:

> A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:
>
> (a) The Court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.
>
> (b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

In *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), our Supreme Court reiterated that the trial court is required to choose a sentence within the recommended range unless there is a substantial and compelling reason to depart from that range. *Id.* A majority of the justices agreed that the phrase "substantial and compelling reason" means an objective and verifiable reason that keenly or irresistibly grabs our attention, is "of considerable worth" in deciding the length of the sentence, and exists only in exceptional cases. *Id.* The trial court may depart from the guidelines "for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight." *People v Lowery*, 258 Mich App 167,170; ___ NW2d ___ (2003), citing *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). The trial court must articulate the reason for departure. *Babcock, supra*. This Court must determine whether the trial court articulated a substantial and compelling reason. *Id.* In reviewing the record, we recognize that the trial court is in a better position to make such a determination, and

[2] The PSIR specifically references that OV 13 is being scored at ten points because defendant was being sentenced for two felony convictions and had a felony charge pending.

we give the determination appropriate deference. *Id.* In addition, where the trial court articulates several reasons for a departure and this Court determines that some of the reasons are not substantial and compelling, we must determine whether the trial court would have departed from the range, and departed to the same degree, based on the properly considered reasons. *Id*

In this case, the trial court departed from the sentencing guidelines range of twenty-nine to fifty-seven months and imposed a sentence of sixty-five months to ten years' imprisonment. In doing so, the trial court filed a written departure evaluation, which articulated the following reasons for departure:

> Defendant's prior violent criminal history that was not included in scoring PRV's [sic] due to the fact they exceed 10 year limitation; prior misdemeanor convictions that were brutal attacks of women involving rage, intimidation and threats; these are Defendant's 4th and 5th felony and 11th and 12th misdemeanor convictions. Defendant's lack of remorse; . . . that court believed facts justified conviction of one count of kidnapping although jury did not; and Defendant's less than truthful statements to even his own attorney who had earlier argued that all of Defendant's earlier misdemeanor convictions were simple assaults arising out of his employment as an auto repossessor.

At sentencing, the trial court stated, in relevant part:

> The Court is going to enter a sentence as follows: I believe there are substantial and compelling reasons to exceed the guidelines in this matter. That notwithstanding 30 years of allegedly crime-free conduct, the circumstances in this offense were so abhorrent to this Court that - - exercise of its discretion. The fact that all of the points that were included, based on the defendant's prior record, based on the fact that they really were are [sic] properly scorable because they occurred so far ago, are not properly accounted for. That is one reason for this Court to find substantial and compelling reasons to exceed the guidelines.
>
> Secondly, the defendant has expressed, as far as I'm concerned, no remorse whatsoever towards the injury that was incurred by the victim. The fact that he's saying I'm sorry, the fact that he hopes she can get on with her life is totally belied by what occurred on that frightful day to her. There's been no explanation whatsoever by Mr. Perry as to any justification whatsoever for anything that occurred that day.[3]
>
> * * *

[3] Defendant did not apologize to the victim for causing her injury. He indicated he was sorry "this happened," that he had no animosity to the victim, and that he hoped both he and she could get on with their lives and put "this" in the past. He never acknowledged wrongdoing or injury to the victim.

> With regard to the testimony of all of the witnesses that saw what happened, the Court will indicate for the record that they all, as a whole, come together to paint a picture of an individual who is controlling, an individual who, even in light of someone right there saying stop, kept hitting her.

The trial court indicated that the above findings led to the imposition of the sentences, which were then articulated.

The principal factor articulated by the trial court was an objective and verifiable reason that keenly or irresistibly grabs our attention and was of considerable worth in deciding the length of defendant's sentence. Defendant has committed several other assaultive crimes against women, which resulted in misdemeanor convictions and were, in some respects, similar to the assaults in this case. They involved defendant intimidating, beating, and threatening women, and forcing women to different places or holding them against their will. These several misdemeanor incidents were not considered when defendant's prior offense variable score was calculated because the guidelines did not call for the scoring of these older convictions. Thus, the legitimate factor relied on by the trial court was not considered by the guidelines, and it served to highlight defendant's vicious and controlling behavior toward women. The factor alone was a substantial and compelling reason to support the departure. It is also apparent that the trial court would have departed from the recommended range, and departed to the same extent, based on this factor alone. It was the principal, and most troublesome, factor cited by the trial court before citing other factors of a secondary nature.

Where there is a substantial and compelling reason for the departure, the extent of the departure is reviewed for an abuse of discretion. *Lowery*, *supra* at 171, citing *Babcock*, *supra*. A given sentence may constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires the sentence to be proportional to the seriousness of the offense and the offender. *Id*. In this case, the sentence is proportionate. It reflects the seriousness of the crime and the seriousness of defendant's history as an offender. There was no abuse of discretion in the upward departure of eight months from the recommended sentence range.

IV

Defendant next argues that his constitutional rights were violated because the prosecutor intimidated a particular character witness. Defendant's argument is cursory and leaves this Court to discover and rationalize the basis for his position that reversal is required. We therefore find that the issue is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nevertheless, we note that, during trial, defendant raised an issue about the potential intimidation of one character witness. The trial court conducted an evidentiary hearing and concluded that the claim had no validity. Defendant had listed numerous character witnesses on his witness list in addition to the witness who was allegedly intimidated. Defendant ultimately chose, as a matter of trial strategy, not to call any character witnesses. The record does not indicate that this strategy decision hinged on the alleged intimidation of one particular witness. It is axiomatic that a party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Because defendant took the strategic position that no character witnesses would be called, he cannot now argue that the

prosecutor's alleged interference with one of the potential character witnesses constitutes error requiring reversal.

V

Defendant also contends that the trial court erred by failing to instruct the jury that it needed to agree on which specific act constituted the basis for a conviction of assault with intent to do great bodily harm. Defendant failed to request a special unanimity instruction at trial and never objected to the trial court's failure to provide one. Failure to request an omitted instruction or object to an alleged defect waives the issue unless a failure to review would result in manifest injustice. *People v Sabin (On Remand),* 242 Mich App 656, 657-658; 620 NW2d 19 (2000). Defendant must show that a plain error affected his substantial rights. *Carines, supra* at 763.

The trial court gave a general unanimity instruction when initially instructing the jury. It also initially instructed the jury, in part, that in order to convict defendant on the charge of assault with intent to do great bodily harm less than murder, it had to find that defendant tried to injure the victim with an automobile. During deliberations, the jury requested clarification about whether the *intent* to do great bodily harm had to "be with the automobile." The trial court realized that the insertion of the words "with an automobile" in the original instruction was an error of law. It reinstructed the jury, in relevant part, that it needed to find, as one of the essential elements, that defendant tried to physically injure the victim "with or without" an automobile. Defendant does not contest the propriety of the subsequent instruction, which clarified the misconception that the assault and intent had to be specifically related to the automobile. Rather, he argues that the jury was permitted to reach a non-unanimous verdict with respect to which conduct, defendant striking the victim with his automobile or his subsequent conduct of leaving the car and continuing a physical assault, formed the basis for the conviction. The argument has no merit.

The charge of assault with intent to do great bodily harm less than murder was related to defendant's conduct after the victim fled his business. The evidence at trial showed that defendant knocked the victim down with his vehicle, exited the vehicle, and began striking the victim and knocking her against the car. The continuous conduct formed the basis for the charge. In *People v Cooks,* 446 Mich 503, 512; 521 NW2d 275 (1994), our Supreme Court held that "a specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense." The *Cooks* case, like the majority of cases addressing unanimity instructions, involved multiple, distinct sexual acts that could have formed the actus reus of a single criminal offense. Specifically, in *Cooks,* the victim testified about three materially similar sexual acts, but the defendant was only charged with one act. In discussing special unanimity instructions, the Court cited with approval several decisions from other jurisdictions involving the "continuing offense" exception, i.e., where two offenses are so closely connected in time that they form one transaction, where alternative acts are presented as evidence of a single offense, or where the offense consists of a continuous course of conduct. *Id.* at 519-524. The Court concluded:

> We are persuaded by the foregoing federal and state authority that if alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the

> alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Id.* at 524.]

In rejecting that a specific unanimity instruction was required, the Court in *Cooks* noted that the defendant did not present a separate defense for the multiple acts presented to the jury. *Id.* at 528. In addition, he did not offer materially distinct evidence of impeachment regarding any particular act. *Id.*

In this case, the acts surrounding the charged offense occurred so closely in time that they constitute one continuous transaction. The testimony of the victim and others described continuous assaultive actions by defendant against the victim after he caught up to her in his automobile. There was no evidence of a distinct series of alternative acts. We recognize that defendant called an accident reconstructionist to support his position that he did not intentionally hit the victim with his automobile. Defendant's theory was that he followed the victim in his car in order to protect her from hurting herself. He pulled alongside her and "herded" her so that she could not run back onto the busy road. After she ran into his car, he grabbed her to protect her. While the expert provided support for defendant's theory that he did not run into the victim directly at a high rate of speed, the defense theory as a whole was not materially distinct. The theory was that defendant was trying to protect the victim both when he "herded" her with her automobile and when he grabbed her after she was hit by the car. Defendant defended the continuous assault by claiming that his actions were innocent actions taken to assist and protect the victim. In light of the evidence and theories presented, defendant has not shown that failure to provide a specific unanimity instruction was plain error.

VI

Defendant next argues that the trial court improperly refused to give a simple assault and battery instruction as a lesser included offense of assault with intent to do great bodily harm. We need not decide the propriety of the trial court's decision refusing the requested instruction.

> Where the trial court instructs on a lesser included offense which is intermediate between the greater offense and a second lesser included offense, for which instructions were requested by the defendant and refused by the trial court, and the jury convicts on the greater offense, the failure to instruct on that requested lesser included offense is harmless if the jury's verdict reflects an unwillingness to have convicted on the offense for which instructions were not given. [*People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).]

See also *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997). In the instant case, the trial court instructed the jury on the charged offense of assault with intent to do great bodily harm. It also instructed the jury on four lesser offenses that were intermediate between the greater, charged offense and the requested lesser offense of assault and battery. The intermediate offenses included felonious assault with an automobile, felonious assault, felonious driving and aggravated assault. The jury's verdict clearly reflects an unwillingness to convict on simple assault and battery where it rejected all of the intermediate offenses. Any error is therefore harmless.

VII

Defendant challenges several statements made by the prosecutor during closing argument.[4] None of the statements were met with an objection. Therefore, we review these unpreserved issues for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines*, *supra* at 752-753, 763.

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [Citations omitted.]

No error requiring reversal will be found if the prejudicial effect of the prosecutor's improper conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

We have reviewed the numerous challenges and disagree with defendant that they constitute misconduct. The prosecutor did not make improper civic duty arguments, playing on the fears or prejudices of the jury. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). He also did not inject any issues broader than defendant's guilt, or call on the jurors to suspend their powers of judgment. *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Further, he never argued or suggested that the jury should suspend its own powers of judgment in deference to the police or the prosecutor. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995); *People v Humphreys*, 24 Mich App 411, 418; 180 NW2d 328 (1970). Our review of the challenged remarks in context reveals that the prosecutor argued the evidence and reasonable inferences arising therefrom.

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." [*People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).]

[4] In discussing this issue, defendant additionally refers to certain prosecutorial conduct that occurred outside of closing argument. These issues are not raised in the statement of the questions presented. Review is therefore inappropriate. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

A prosecutor is not required to state inferences or conclusions in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In other words,

> prosecutors may use "hard language" when it is supported by the evidence and are not required to phrase arguments in the blandest of all possible terms. Emotional language may be used during closing argument and is "an important weapon in counsel's forensic arsenal." [*People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).]

The challenged comments did not constitute plain error, and we note that the jury was specifically instructed that the arguments of the attorneys are not evidence. Reversal is not required.

VIII

Defendant next claims that, during closing argument, the prosecutor argued facts that were outside of the record. These challenges are also unpreserved because they were not met with an objection. Accordingly, we review them for plain error. *Aldrich, supra.* While a prosecutor is not entitled to argue facts that are unsupported by the evidence, he is free to argue the evidence and all reasonable inferences. *People v Callon*, 256 Mich App 312, 330; 662 NW 2d 501 (2003). The challenged statements were based on the evidence and reasonable inferences drawn from it.

Defendant first claims that the prosecutor improperly argued that part of defendant's plan was to disable the victim's car so that he could assault her. The evidence, however, clearly supported the argument. Defendant disabled the victim's automobile and subsequently waited for her to return to the parking lot. After she returned to the parking lot, he assaulted her. The argument was a reasonable inference from the evidence and does not constitute plain error.

We also find no impropriety in the prosecutor's argument that defendant gave Korotney "fifty bucks for her gas, time, and trouble, *or to buy her silence*, whatever." Korotney testified that, while she was driving defendant to pick up lunch, he spotted the victim's car and asked her to follow it. She thereafter drove defendant around, retrieved the victim's car keys for defendant, waited for defendant, and transported the victim and defendant back to the shop. She witnessed defendant assault the victim and heard defendant threaten Lowe's life. Korotney testified that, when defendant handed her $50, she inquired about why he was giving her money. Defendant replied that it was for her gas and troubles. At trial, she acknowledged that she only used four or five dollars worth of gas. The prosecutor's argument that the $50 may have been to buy her silence was a reasonable inference drawn from the evidence.

Additionally, we find that the prosecutor's colorful use of language when describing what witness Michael Jacobs observed does not constitute improper argument. Jacobs saw defendant hitting the victim with a "balled" fist, more than one time. It was entirely appropriate for the prosecutor to state that Jacobs witnessed defendant "wailing" on the victim. *Bahoda, supra; Ullah, supra.* Similarly, the prosecutor's harsh language, indicating that defendant "gunned" the victim down with his car, was also based on the evidence, including evidence that he was driving at a fast pace and ran the car over a curb. *Id.*

Finally, defendant challenges the prosecutor's statement that the earring found in the Meijer parking lot was a pierced earring, which would have required force to rip from an ear. He argues that there was no evidence that the earring was pierced. The earring, however, was presented to the victim at trial and was identified by her. While the record does not indicate whether it was a pierced earring, the prosecutor and the jury had an opportunity to observe the earring, which was admitted into evidence. The record does not support a finding that the prosecutor's argument constituted plain error.

IX

Defendant next argues that he was denied the effective assistance of counsel because counsel failed to object to the improprieties alleged in parts VII and VIII, *supra*. Our review of this claim is limited to errors apparent on the record because no *Ginther*[5] hearing was held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and prejudicial to him. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). He must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Stanaway*, *supra*.

Defendant cannot demonstrate that counsel's performance was objectively unreasonable. Defense counsel was not required to make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). As previously discussed, any objection on the ground that the prosecutor was arguing facts not in evidence would have been meritless. Moreover, there has been no showing that the other challenged statements by the prosecutor during closing argument were objectionable. Moreover, even if defendant could convince us that counsel should have objected to one or more of the challenged remarks, defendant has not demonstrated the requisite prejudice necessary to obtain relief. While he asserts that there is a "reasonable probability" that the result of the proceeding would have been different, his bald conclusion is not persuasive. The evidence against defendant was overwhelming, and the jury was instructed that the attorneys' arguments were not evidence.

As an alternative to convincing us of his position based on the current record, defendant requests an evidentiary hearing to further explore the issue of the effectiveness of his counsel. This request is untimely, MCR 7.211(c)(1), and is denied.

X

Defendant also argues that counsel was ineffective for failing to file a motion to suppress the statements he made to the police both at the scene where he hit the victim with his

[5] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

automobile and at his business on the following day. Defendant cannot meet his burden of proving ineffective assistance of counsel, i.e., that counsel's failure to move to suppress fell below an acceptable standard of reasonableness and that, but for counsel's failure, the outcome of the trial would have been different. *Stanaway, supra.* Counsel is not required to make frivolous or meritless motions, *People v Darden,* 230 Mich App 597, 604-605; 585 NW2d 27 (1998), and a motion to suppress would have been meritless.

Defendant was not entitled to *Miranda*[6] warnings before his statements at the scene or in his own place of business. *Miranda* warnings need to be given to an accused when he is subject to custodial interrogation. *People v Coomer,* 245 Mich App 206, 219; 627 NW2d 612 (2001). "The term 'custodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of freedom of action in any significant way.'" *Id.,* citing *People v Hill,* 429 Mich 382, 387; 415 NW2d 193 (1987). A determination of custody depends on objective factors and not on the subjective views of the interrogating officer or the person being questioned. *Id. Miranda* intends that warnings be given if a defendant is under arrest or is in a police-dominated, coercive atmosphere. *People v Ish,* 252 Mich App 115, 118; 652 NW2d 257 (2002). General, on-the-scene questions to investigate the facts do not implicate *Miranda. Id.* Thus, the on-scene questioning did not require *Miranda* warnings. Moreover, nothing in the record supports defendant's claim that he was in custody in his own shop when he was questioned the following day. The officer was a personal friend of defendant, and questioned him in front of Painter. Defendant's claim that he was coerced and felt restrained is based on his subjective, unsupported, and self-serving assertions. Because it is not apparent from the record that a suppression hearing would have been successful, defendant has not shown that defense counsel's failure to request one fell below an objective standard of reasonableness.

XI

Defendant next claims that, at the end of trial, the trial court improperly allowed the prosecutor to amend the information on the charge of assault with intent to do great bodily harm. He claims that he was on notice that the charge only related to his attempt to run the victim over with his automobile and not to any conduct that occurred immediately after he hit the victim with his car. Because the trial court allowed the prosecutor to advance a theory based on what occurred after defendant exited his vehicle and because the trial court instructed the jury that the charge was not limited to conduct with the automobile, it tacitly approved an amendment to the information. Defendant alleges that he was "ambushed" by this and could not present a proper defense. We disagree.

There was no amendment to the information in this case. Defendant was charged with assault with intent to do great bodily harm. The information did not limit the charge to defendant's conduct in striking the victim with his automobile. During closing argument at the preliminary examination, the prosecutor indicated that the charge was related to what occurred in the vehicle. The prosecutor subsequently clarified that the charge was related to defendant's

[6] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

driving over the curb, trying to run the victim over, and then beating her. The trial court bound defendant over, stating:

> In terms of great bodily harm, the testimony is the defendant drove up past the sidewalk at a high rate of speed and struck the victim in this case, Ms. Olbert, and didn't even stop punching her after other strangers appeared and tried to come to her aid. I don't have any question that there is certainly probable cause on count 6 added, assault with intent to do great bodily harm.

Defendant's argument that he was not given notice of the prosecutor's theory is disingenuous and unsupported by the record. Defendant was not ambushed by any "amendment" to the information. The charge was never limited to defendant's striking of the victim with the automobile, but encompassed the entire assaultive transaction occurring after the victim fled.

In addition, we note that a trial court may permit amendment of an information at anytime before, during, or after trial unless doing so would unfairly surprise or prejudice defendant. MCL 767.76; *People v Jones*, 252 Mich App 1, 4; 650 NW2d 717 (2002), citing *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998). Even if we accepted defendant's claim that there was an amendment, there was no unfair surprise or prejudice. The ruling following the preliminary examination provided notice. Moreover, in opening statement, the prosecutor expressed that it was his theory that defendant hit the victim with his automobile and continued to assault her thereafter. In closing argument, the prosecutor argued his theory that defendant hit the victim with his automobile, continued assaulting her immediately thereafter, and broke off the assault only on the third order from a bystander. The evidence offered at trial supported the continuous assault theory.

XII

Finally, defendant argues that the cumulative effect of the trial errors resulted in a denial of his right to a fair trial. We have found no errors of consequence that cumulatively denied defendant a fair trial. *Cooper, supra* at 659-660; *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski